NO. 49998-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARRY SMITH, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth Martin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence under CrR 3.6, in violation of appellant's constitutional right to be free from unreasonable seizures. CP 51 (Conclusion of Law 8).[1]

2. The trial court erred in concluding the 911 caller was a "known citizen informant" and his tip regarding suspected criminal activity was "presumptively reliable." CP 50 (Conclusions of Law 3-4).

3. The trial court erred in concluding the citizen informant provided sufficient facts that appellant was engaged in criminal activity. CP 50 (Conclusion of Law 5).

4. The trial court erred in concluding the sheriff's deputy made observations that corroborated the presence of criminal activity. CP 50 (Conclusion of Law 6).

5. The trial court erred in concluding the deputy conducted a valid stop of appellant pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). CP 50 (Conclusion of Law 7).

6. Without the improperly admitted evidence, there was insufficient evidence to support appellant's conviction for unlawful possession of a stolen vehicle.

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[1] The trial court's written findings of fact and conclusions of law denying appellant's motion to suppress are attached to this brief as an appendix.

Issue Pertaining to Assignments of Error

Police may not detain a person without reasonable, articulable suspicion of criminal activity. Here, a 911 caller reported a truck occupied by three people was "casing" an apartment complex, but did not provide any factual basis for that conclusion. The responding deputy did not know the caller and did not corroborate any incriminating information before seizing appellant, the driver of the truck. Must the resulting evidence be suppressed and appellant's conviction dismissed for insufficient evidence because the investigative detention violated appellant's right to be free unreasonable, warrantless seizures under the Fourth Amendment and article I, section 7 of the Washington Constitution?

B. STATEMENT OF THE CASE

On August 3, 2016, the State charged Larry Smith, Jr., with unlawful possession of a stolen vehicle.[2] CP 3-4. The State alleged that on August 2, 2016, Smith knowingly possessed a stolen motor vehicle and withheld or appropriated that vehicle from its true owner. CP 3.

1. Substantive Evidence

Pierce County Sheriff's Deputy Kohl Stewart was dispatched to the Miramonte Apartments in Tacoma, Washington, around 3:50 p.m. on

[2] The State also charged Smith with resisting arrest, but later voluntarily dismissed that charge. CP 25; 3RP 8-9.

August 2, 2016. 2RP 6-8.[3] An unknown citizen called 911 to report a suspicious black and maroon Dodge Ram truck occupied by three people. 2RP 8-11; Ex. 1. The informant believed the individuals were "casing the area" around Building E of the apartments and that they had been responsible for recent vehicle prowls. 2RP 10-11, 33; Ex. 1.

The CAD (computer aided dispatch) report noted the informant provided a name (Jay Johnson) and phone number, but asked to remain anonymous. 2RP 11-12, 32; Ex. 1. The report further noted the informant's location had been verified. 2RP 11-12; Ex. 1. Steward did not know the caller and did not speak with him. 2RP 26-27. Stewart later learned the informant lived at the apartment complex, but had given a false name to the dispatcher. 2RP 26-27, 32.

Stewart arrived at the apartment complex about 10 minutes after the dispatch. 2RP 12. Stewart explained he was familiar with the apartments because of history of stolen cars and vehicle prowls there. 2RP 8. He acknowledged, however, there was "[n]othing immediately specific" that had occurred at the complex. 2RP 8, 27.

Upon arriving, Stewart saw at least two people in a black and maroon Dodge truck that was backing into a parking space in front of

[3] This brief refers to the verbatim reports of proceedings as follows: 1RP – December 22, 2016; 2RP – January 10, 2017; 3RP – January 27, 2017; 4RP – January 30, 2017.

building H, rather than building E. 2RP 12. He acknowledged he did not see anything suspicious. 2RP 30-31. Nevertheless, Stewart parked his vehicle approximately 15 feet away from the truck and contacted the driver, later identified as Smith. 2RP 13, 29. He noted there were three men, including Smith, inside. 2RP 14-15.

Stewart asked Smith what they were doing at the apartment complex. 2RP 14-15. Smith said they were there to see someone named Mark. 2RP 15. Steward asked Smith to turn off the truck because it was loud. 2RP 14. Stewart then asked for Smith's name, ran the truck license plate, and discovered it had been reported stolen the day before. 2RP 15-16.

Stewart called for backup and asked Smith to step out of the vehicle, but Smith refused. 2RP 16-17. After a scuffle, the officers used a Taser on Smith, removed him from the vehicle, and placed him under arrest. 2RP 17-18. Stewart discovered the truck ignition had been punched. 2RP 18.

2. CrR 3.6 Motion and Hearing

Before trial, Smith moved to suppress all the evidence obtained as a result of Stewart's seizure. CP 5-20. Smith argued he was seized when Stewart commanded him to turn off the vehicle. CP 9-14. Smith further argued the seizure was not supported by reasonable, articulable suspicion under Terry. CP 14-17. Specifically, Smith asserted the citizen informant's tip did not bear sufficient indicia of reliability to give rise to reasonable

suspicion. CP 14-17. The 911 caller did not give a factual basis for his conclusion that the truck was casing the area and Stewart did observe any suspicious behavior before seizing Smith. CP 14-17.

The State agreed Smith was seized pursuant to Terry. CP 56-57; 2RP 38. However, the State claimed the citizen informant's tip was presumptively reliable and he reported "objective facts that indicated criminal rather than legal activity." CP 61. Stewart then identified the vehicle based on the caller's description and the number of occupants. CP 61. As such, the State argued, the totality of the circumstances gave Stewart reasonable, articulable suspicion that criminal activity was occurring. CP 61.

The trial court held a CrR 3.6 hearing on January 10, 2017, at which Stewart testified. 2RP 5-6. Stewart testified to the facts as described above. 2RP 5-35. The court denied Smith's motion to suppress, concluding Stewart conducted a valid Terry stop. 2RP 59. The court reasoned that Stewart identified the described truck and observed it "to be in motion in a manner that arguably could be innocuous but also consistent with criminal activity of vehicle prowling." 2RP 59. The court explained this was a "corroborating factor" that justified the stop. 2RP 61.

The court subsequently entered written findings of fact and conclusions of law, including the following conclusions:

3) A known citizen informant who provided his name, address and phone number, which was verified by 911 dispatch, provided the basis for the deputy's contact with the defendant.

4) This known citizen's tip regarding suspected criminal activity was presumptively reliable.

5) The 911 caller provided sufficient facts that allowed the deputy to believe, based upon a totality of the circumstances, that the defendant and other occupants of the Dodge Ram truck were engaged in criminal activity.

6) The deputy observed the vehicle in motion, which was consistent with possible criminal behavior, and was a corroborating factor of criminal activity.

7) The deputy conducted a valid stop of the defendant pursuant to Terry v. Ohio, supra.

8) The defendant's motion to suppress evidence is denied. The evidence is admissible at the defendant's trial.

CP 50-51.

3. Stipulated Facts Trial and Sentencing

After losing the CrR 3.6 motion, Smith proceeded to a stipulated facts trial. 3RP 2-9; CP 45-47. Based on the evidence as stated in the police reports, the trial court concluded Smith knowingly possessed a stolen motor vehicle; acted with knowledge that the truck had been stolen; and withheld or appropriated the truck from the true owner. CP 46; 3RP 9-11. The court therefore found Smith guilty of unlawful possession of a stolen vehicle. CP 46; 3RP 11.

The trial court adopted the parties' agreed sentence recommendation of 43 months. CP 27; 4RP 7-8. Smith filed a timely notice of appeal. CP 52.

C. ARGUMENT

SMITH'S CONVICTION SHOULD BE REVERSED BECAUSE THE DEPUTY LACKED REASONABLE SUSPICION TO CONDUCT A VALID TERRY STOP BASED ON AN UNKNOWN CITIZEN INFORMANT'S TIP WITH NO INDICIA OF RELIABILITY.

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article 1, section 7 of the Washington State Constitution." State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State bears the "heavy burden" of demonstrating a warrantless search or seizure falls into one of the "'jealously and carefully drawn'" exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

The Terry stop—a brief investigatory seizure—is one such exception. Doughty, 170 Wn.2d at 61-62. A Terry stop requires "a well-founded suspicion that the defendant engaged in criminal conduct." Id. at 62. "'[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational

inferences from those facts, reasonably warrant that intrusion.'" Id. (quoting Terry, 392 U.S. at 21). This Court reviews de novo whether the State met its burden to justify a Terry stop. State v. Saggers, 182 Wn. App. 832, 839, 332 P.3d 1034 (2014).

When an officer bases his or her suspicion on an informant's tip, the State must show the tip bears some indicia of reliability under the totality of the circumstances. State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). There must be either "(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." Id. The observations "must corroborate more than just innocuous facts, such as an individual's appearance or clothing." Id. at 618-19.

A seizure occurs the moment a reasonable person would not feel free to leave. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). In this case, there is no question Smith was seized without a warrant when Stewart approached the truck, contacted Smith, and asked Smith to turn off the vehicle. The State did not dispute "this was a Terry stop right from the get-go." 2RP 38. The court likewise concluded Stewart seized Smith pursuant to Terry. CP 50. No reasonable person would feel free to walk away under those circumstances.

The warrantless seizure was unconstitutional because the scant facts known to Stewart at the time did not provide reasonable suspicion of criminal activity. The unknown citizen informant was not reliable and did not provide reliable information. Nor was Stewart aware of any other facts supporting articulable suspicion of criminal activity. The remedy for this constitutional violation is suppression of the evidence under the exclusionary rule, and, without the illegally obtained evidence, Smith's conviction must be reversed for insufficient evidence. State v. Gatewood, 162 Wn.2d 534, 542, 182 P.3d 426 (2008); State v. Hopkins, 128 Wn. App. 855, 866, 117 P.3d 377 (2005), overruled on other grounds by Z.U.E., 183 Wn.2d 610.

1. The previously unknown citizen informant was not presumptively reliable.

The trial court concluded the 911 caller was a "known citizen informant" and therefore his "tip regarding suspected criminal activity was presumptively reliable." CP 50. This was the court's first error. A "known citizen informant" is one who is *previously* known to the police. A named but previously unknown informant, like the caller here, is not presumptively reliable: "Even a named, but otherwise unknown, citizen informant is not presumed to be reliable and a report from such an informant may not justify an investigative stop." State v. Z.U.E., 178 Wn. App. 769, 780, 315 P.3d 1158 (2014), aff'd, 183 Wn.2d 610, 352 P.3d 796 (2015).

Case law makes this clear. For instance, in State v. Sieler, a father waiting to pick up his son at school called the school secretary to report he saw a drug sale in another car in the parking lot. 95 Wn.2d 43, 44-45, 621 P.2d 1272 (1980). He described the car, reported its license plate number, and gave his name and telephone number. Id. at 44-45. The supreme court held the informant's name and number were not enough to establish his reliability: "The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable."[4] Id. at 48.

This Court relied on Sieler in Hopkins, 128 Wn. App. at 858, where an unknown 911 caller reported a minor might be carrying a gun. The caller gave his name and cell phone number, and a second call provided police with another phone number. Id. The court held that providing the name and number of an informant unknown to officers is insufficient to establish reliability and cannot by itself justify an investigative stop. Id. at 863-64.

The 911 caller in Smith's case was previously unknown to Stewart. 2RP 26-27. The caller's name, phone number, and location were not

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[4] Accord Florida v. J.L., 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" (citation omitted) (quoting Alabama v. White, 496 U.S. 325, 329, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)).

sufficient to establish reliability, as the cases discussed hold. He was therefore not presumptively reliable, as the trial court concluded. CP 50. Further, the caller asked to remain anonymous and Stewart later learned the caller had not provided his true name. 2RP 11-12, 27, 32. This is why unknown informants are not presumptively reliable. Their credibility has not previously been assessed and they can easily fabricate an alias, as the caller did here.

2. No other circumstances established the reliability of the informant's tip.

Because the informant's name and phone number alone do not provide sufficient indicia of reliability, this Court must consider whether other circumstances established the reliability of the tip. An informant's "bare conclusion unsupported by any factual foundation" is insufficient to support an investigatory stop. Sieler, 95 Wn.2d at 49.

When a 911 caller implicitly but necessarily claims eyewitness knowledge of the alleged crime, that fact weighs in favor of finding the tip reliable. Navarette v. California, __U.S.__, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014). For example, in Navarette, a driver called 911 to report she had just been run off the road and gave the license plate number and description of the offending vehicle. Id. at 1686-87. The Court concluded the information about having been run off the road necessarily implied first-

hand eyewitness knowledge of the incident. Id. at 1689. The Court also concluded the traceability of 911 calls and the immediacy of the report weighed in favor of finding the caller reliable. Id. at 1689-90. While acknowledging "this is a close case," the Court held the 911 call established reasonable suspicion of drunk driving and justified stopping the vehicle. Id. at 1692.

Smith's case falls on the other side of the line identified in Navarette because the link in the chain that led the Navarette Court to find a 911 call reliable in that case is absent here: The evidence in Smith's case does not establish how the 911 caller came to suspect the occupants of the Dodge Ram were "casing the area" or that they were responsible for recent vehicle prowls. Z.U.E. provides a useful contrast to Navarette on this point.

In Z.U.E., a 911 caller who identified herself as Dawn reported she saw a 17-year-old female hand off a gun to a shirtless man, who then carried the gun through a park. 183 Wn.2d at 614. Dawn gave dispatch a detailed description of the girl's appearance and clothing, but did not reveal why she believed the girl to be 17 years old. Id. The girl's age was the only "fact" that potentially made her possession of the gun unlawful. Id. at 622.

The Washington Supreme Court noted several factors "tend[ed] to bolster the reliability of [Dawn's] tip." Id. at 622. For instance, Dawn was a citizen eyewitness who made a contemporaneous report "to the unfolding of

the events." Id. She called the "emergency 911 line rather than the police business line," and provided her name and contact information. Id. The court noted this was similar to Navarette in that "the officers' alleged suspicion hinged on a named, but otherwise unknown, 911 caller's assertion that the subject was engaged in criminal activity." Id.

Unlike Navarette, though, Dawn "did not offer any factual basis in support of [the] allegation" that the girl was 17 years old. Id. As such, "the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old." Id. at 622-23. Furthermore, "[t]he officers knew nothing about Dawn (aside from her contact information), Dawn's relationship with the female, or why Dawn suspected that the girl had committed a crime in the first place." Id. Although the court presumed Dawn reported honestly, "the officers had no basis on which to evaluate the accuracy of her estimation." Id. at 623. The court therefore held Dawn's 911 call did not create a sustainable basis for a Terry stop. Id.

Similarly, in Sieler, James Tuntland reported a possible drug transaction in a high school parking lot. 95 Wn.2d at 44-45. He described the vehicle and license plate number, but gave no details of the transaction. Id. at 45. The police believed it was not unusual for such transactions to occur during the noon hour in the high school parking lot. Id.

The supreme court held the subsequent Terry stop was unlawful because it was "based upon an informant's bare conclusion unsupported by any factual foundation known to the police." Id. at 49. The court explained:

> Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made. It simply makes no sense to require some indicia of reliability that the informer is personally reliable but nothing at all concerning the source of his information. This additional requirement helps prevent investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct. It also reduces such detentions when an informant, who has given accurate information in the past, decides to fabricate an allegation of criminal activity.

Id. at 48-49 (internal quotation marks omitted) (citation omitted).

Smith's case is analogous to Z.U.E. and Sieler rather than Navarette. Like in Z.U.E. and Sieler, the informant called 911 and provided a name and phone number, though his name later proved to be false and he asked to remain anonymous. 2RP 11-12, 27, 32. He provided a description of the vehicle (black and maroon Dodge Ram) and number of occupants (three), suggesting the 911 call was "contemporaneous to the unfolding of the events," as in Z.U.E., 183 Wn.2d at 622.

However, also like Z.U.E. and Sieler, Stewart did not know anything about the 911 caller except for his contact information, the caller's relationship with the individuals in the truck, or why the caller suspected

criminal activity. Specifically, the informant did not offer any underlying factual justification to support his allegation that the truck was "casing the area."[5] All he told dispatch was there was a suspicious vehicle, that either the vehicle or the individuals were "casing the area"—he did not specify—and that he believed they were responsible for recent vehicle prowls in the area. 2RP 10-11, 33.

The caller did not provide any details or observations for his "bare conclusion" that the individuals were casing the area. For instance, the caller did not say the truck was driving around slowly, that the individuals were looking in car windows, or that he had seen the same individuals engaging in similar behavior at an earlier date. This is analogous to Sieler, where Tuntland reported his conclusion that there was a drug transaction, but did not provide any details as to what he saw that made him think that. Without

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[5] The State alleged additional facts in its response to Smith's motion to suppress. CP 54-56. For instance, the State claimed the caller told the 911 dispatcher that a passenger in the truck "had gotten out and had looked into a couple cars already." CP 54. However, this information was not in the CAD report and was not otherwise known by Stewart when he seized Smith. See Ex. 1; 2RP 25-26 (Stewart could not remember the dispatcher telling him any information beyond what was stated in the CAD report).

In determining whether a Terry stop is valid, courts consider only "facts available to the officer at the moment of the seizure." Terry, 392 U.S. at 21-22; accord Gatewood, 163 Wn.2d at 539 ("The officers' actions must be justified at their inception."); Hopkins, 128 Wn. App. at 863 (considering only facts available to the officers at the time of the seizure, noting the officers "did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions"). Furthermore, the State's allegations were not proven at the CrR 3.6 hearing and are therefore not supported by substantial evidence in the record.

facts to support the 911 caller's belief that the truck was casing the area, there was no way police could assess the probable accuracy of the caller's conclusion. See State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992) ("[E]stablishing the basis for the informant's knowledge is vital in establishing the reliability of the tip on which the reasonableness of the investigatory stop depends.").

The justifications for this rule, as articulated in Sieler, are apparent in this case. Without some factual basis, Stewart had no way to corroborate the 911 caller's tip. The 911 caller could have been acting out of specific animosity for the occupants of the truck. See Saggers, 182 Wn. App. at 841 ("The goal of corroboration is to reduce the chance of acting on a malicious prank initiated at the defendant's expense."). Or perhaps the 911 caller was irritated that a loud truck was idling outside his apartment. He could have misconstrued innocent conduct or fabricated the claim (perhaps bolstered by giving a false name and wishing to remain anonymous). Without some factual basis for the caller's allegation, there was no way for Stewart to verify its reliability.

3. Deputy Stewart failed to corroborate any sign of suspicious activity before seizing Smith.

Absent circumstances sufficiently establishing the reliability of the tip, the officer must be able to "independently corroborate" the presence of

criminal activity. Z.U.E., 183 Wn.2d at 623. Here, Stewart observed no suspicious circumstances whatsoever before detaining Smith. 2RP 30-31. The State failed to show Stewart corroborated any non-innocuous details via independent investigation.

Stewart arrived in the apartment complex approximately 10 minutes after receiving the dispatch. 2RP 12. He saw at least two people in a black and maroon Dodge truck backing into a parking space in front of building H. 2RP 12. Though the truck was not in front of building E, as the 911 caller reported, it did match the caller's description of the truck and potentially matched the identified number of occupants (three). 2RP 8-11. However, "police observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion." Sieler, 95 Wn.2d at 49-50. Thus, Stewart's identification of the truck was not a sufficient corroborating observation.

Stewart also explained he was familiar with the particular apartment complex because of a history of vehicle prowls there. 2RP 8. But he also readily acknowledged he knew of "[n]othing immediately specific" that had occurred at the complex. 2RP 8, 27. An individual's presence in a high crime area does not establish reasonable suspicion. Doughty, 170 Wn.2d at 62 (recognizing a person's presence in a high-crime area at a late hour does

not, by itself, give rise to reasonable suspicion); Sieler, 95 Wn.2d at 49 ("[T]he presence of the defendants in an area where drug transactions were known to occur could not by itself give rise to a reasonable suspicion that they were engaged in criminal activity.").

The only other observation Stewart made before contacting Smith was the Dodge truck backing into a parking spot. 2RP 12. The trial court concluded Stewart's observation of "the vehicle in motion" was "consistent with possible criminal behavior, and was a corroborating factor of criminal activity." CP 50. But backing into a parking spot is an entirely innocuous fact. Stewart merely corroborated that the identified truck was present at the apartment complex, which cannot establish reasonable suspicion. See J.L., 529 U.S. at 272 ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."); Z.U.E., 178 Wn. App. at 787 ("[C]onfirming a subject's description or location or other innocuous facts does not satisfy the corroboration requirement.");

Even more importantly, Stewart had no factual basis for the 911 caller's conclusion that the truck was casing the area. Stewart explained the truck being in a different spot than originally reported "set off a little alarm in [his] head," because vehicle prowlers will move from location to location. 2RP 33-34. But the 911 caller gave no description of what the truck was

doing that led him to believe it was casing the area. He did not say the truck was slowly driving from car to car, moving to different parking spots, or anything of the like. Stewart acknowledged he did not see any suspicious behavior or activity before contacting Smith. 2RP 30-31. Without some underlying factual justification for the caller's conclusion, Stewart could not assess the "probable accuracy" of that conclusion. Sieler, 95 Wn.2d at 48.

State v. Howerton, 187 Wn. App. 357, 348 P.3d 781 (2015), provides a useful contrast. There, a 911 caller reported she had just witnessed someone break into a van parked across the street from her house. Id. at 362. She gave a detailed description of the individual and said he left on foot heading south. Id. Minutes later, the responding officer saw Howerton, walking that direction and matching the description. Id. at 375. When Howerton noticed the officer's presence, he immediately turned around and walked away. Id. The court concluded this was a sufficient corroborating observation: "Although a suspect's flight from police alone is not enough to justify an investigative stop, it is a factor that may be considered in determining whether reasonable suspicion existed." Id.

There was no similar evidence here. Smith was simply backing the truck into a parking spot. This was not "illegal, dangerous or suspicious activity" sufficient to constitute a corroborating observation, particularly where the 911 caller did not give any factual basis for his conclusions.

Saggers, 182 Wn. App. at 841. The State failed to meet its burden of showing the 911 caller's tip bore some indicia of reliability under the totality of the circumstances. Stewart therefore seized Smith without reasonable, articulable suspicion, in violation of Smith's right to be free from unreasonable, warrantless seizures under the state and federal constitution.

4. Reversal and remand for dismissal with prejudice is the appropriate remedy.

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Thus, if an initial stop is unlawful, evidence discovered during any subsequent search is inadmissible as fruit of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

The same corollary applies to an arrest following an unlawful seizure. Walker, 129 Wn. App. at 575. If an officer finds grounds for an arrest during the unlawful seizure, the arrest is tainted and any evidence discovered during the seizure must be suppressed. Id. This includes the unlawfully seized individual's identity. See, e.g., Doughty, 170 Wn.2d at 60, 65 (suppressing all evidence obtained after the unlawful seizure, including Doughty's identity); State v. Ellwood, 52 Wn. App. 70, 72, 74-75, 757 P.2d

547 (1988) (suppressing Ellwood's name, discovered as a result of an unlawful detention).

Smith's identity was discovered because Stewart illegally seized him. Stewart further learned Smith was in possession of a stolen vehicle as a result of the unlawful seizure. While Smith struggled with the deputies, a set of shaved keys fell out of driver's side of the truck. CP 46. After arresting Smith, Stewart discovered the ignition was punched and the rear window of the cab was broken out. CP 46. Smith also told Stewart he had purchased the truck two days before, but the truck had been reported stolen only one day before. CP 46. This evidence suggested Smith had knowledge the truck was stolen. 3RP 9-11.

None of this evidence would have been obtained absent the illegal seizure. All of it must therefore be suppressed as fruit of the poisonous tree. Without it, the State cannot prove possession of stolen vehicle. This Court should therefore reverse Smith's conviction and remand for dismissal of the charge with prejudice. Armenta, 134 Wn.2d at 17-18.

D. CONCLUSION

For the aforementioned reasons, the evidence against Smith should have been suppressed as the fruit of an unlawful seizure. Smith therefore requests his convicted be reversed and dismissed with prejudice.

DATED this 29th day of June, 2017.

Respectfully submitted,

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Appendix

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LARRY EUGENE SMITH, JR, Defendant.	CAUSE NO. 16-1-03121-0 FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER MOTION TO SUPPRESS EVIDENCE (CrR 3.6)

THIS MATTER came before the Honorable Elizabeth Martin on the 10th day of January, 2017 upon defendant's motion to suppress evidence pursuant to CrR 3.6. The Court reviewed the materials that were submitted, listened to the testimony of Deputy Kohl Stewart and heard the argument of counsel. The Court entered an oral ruling denying the defendant's motion to suppress.

Now, as required by CrR 3.6(b), the Court enters the following written Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On August 2, 2016 at 1550 hours Pierce County Sheriff's Deputy Kohl Stewart was dispatched to the Miramonte Apartments regarding a suspicious vehicle call.
2) A resident at the apartment complex, who asked to remain anonymous, called 911 to report that he believed that the three occupants of a black and maroon Dodge Ram truck were casing the area. The 911 caller further stated that he believed that the occupants of the truck were responsible for recent vehicle prowls.
3) The 911 dispatcher verified the caller's name, location and phone number.

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4) The Deputy later learned, well after this incident, that the 911 caller had not provided his true name

5) The 911 caller reported that the subjects in the Dodge truck were parked in the parking lot in front of his apartment in Building E.

6) The deputy was dispatched at 1552 hours and arrived at the Miramonte Apartments at 1602 hours.

7) The deputy did not locate a black and maroon Dodge Ram truck in front of Building E, but did locate one as it was backing into a parking spot in front of Building H. The truck matched the description provided by the 911 caller.

8) The deputy parked his patrol car approximately 10-15 feet away from the Dodge truck, but did not activate the emergency lights or siren on his patrol car, and he did not park his patrol car in a way that would have prevented the driver of the truck from pulling out of the parking spot.

9) The deputy did not see any suspicious behavior from any of the occupants of the truck prior to contacting the driver of the truck.

10) The deputy got out of his patrol car to contact the driver of the Dodge truck. He was able to see that there were three occupants in the truck, which was consistent with the information provided by the 911 caller.

11) The deputy initially asked the driver of the truck, Defendant Larry Smith, what he was doing at the complex. The defendant said he was there to talk to someone.

12) Because the truck was so loud the deputy asked the defendant to turn it off, which the defendant did. The defendant then provided additional information about why he was at the apartment complex stating that he was there to see "Mark" in the H Building.

13) The deputy asked the defendant for his name, which he provided, and after obtaining that information the deputy returned to his patrol car to run the defendant's name and the license plate of the Dodge truck

14) The deputy estimated that his contact with the defendant lasted approximately two minutes before he returned to his patrol car.

15) When the deputy ran the defendant's name he learned that the defendant's driver's license was suspended in the third degree, and he further learned that the Dodge truck had previously been reported stolen.

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16) The deputy then called for additional assistance, returned to the Dodge truck, and asked the defendant to step out of the truck.

17) The defendant refused to exit the truck and attempted to start the truck. He further demanded to speak to the deputy's supervisor.

18) A second deputy arrived and assisted Deputy Kohl in removing the defendant from the truck, however the defendant actively resisted and was eventually tased to gain compliance.

CONCLUSIONS OF LAW

1) The Court has jurisdiction over this case.
2) Pursuant to *Terry v. Ohio*, 391 U.S. 1, 88 S.Ct 1868 (1968) a law enforcement officer may briefly detain a citizen for questioning where that officer has a well-founded suspicion of criminal activity based upon specific and articulable facts.
3) A known citizen informant who provided his name, address and phone number, which was verified by 911 dispatch, provided the basis for the deputy's contact with the defendant.
4) This known citizen's tip regarding suspected criminal activity was presumptively reliable.
5) The 911 caller provided sufficient facts that allowed the deputy to believe, based upon a totality of the circumstances, that the defendant and other occupants of the Dodge Ram truck were engaged in criminal activity.
6) The deputy observed the vehicle in motion, which was consistent with possible criminal behavior, and was a corroborating factor of criminal activity.
7) The deputy conducted a valid stop of the defendant pursuant *Terry v. Ohio*, supra.

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8) The defendant's motion to suppress evidence is denied. That evidence is admissible at the defendant's trial.

The Court's oral ruling on the admissibility of evidence was given in open court in the presence of the defendant on January 10, 2017. These Findings of Fact and Conclusions of Law were signed this 10 day of January, 2017.

JUDGE ELIZABETH MARTIN

Presented by:

Lisa Wagner
Deputy Prosecuting Attorney
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Approved as to Form:

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